

ESTTA Tracking number: **ESTTA194384**

Filing date: **02/22/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

## Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

### Opposer Information

Name	Cornerstone BioPharma, Inc.
Granted to Date of previous extension	02/23/2008
Address	2000 Regency Parkway Suite 255 Cary, NC 27518 UNITED STATES

Attorney information	Robert J. Morris Smith Anderson Blount Dorsett Mitchell & Jernigan LLP 2500 Wachovia Capitol Center Raleigh, NC 27602-2611 UNITED STATES jmorris@smithlaw.com Phone:(919) 821-1220
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### Applicant Information

Application No	77226994	Publication date	12/25/2007
Opposition Filing Date	02/22/2008	Opposition Period Ends	02/23/2008
Applicant	Vision Pharma LLC Suite E-22 1973 Highway 34 Wall, NJ 07719 UNITED STATES		

### Goods/Services Affected by Opposition

Class 005. All goods and services in the class are opposed, namely: PHARMACEUTICAL PREPARATION FOR THE RELIEF OF SYMPTOMS ASSOCIATED WITH ALLERGIC RHINITIS, VASOMOTOR RHINITIS AND THE COMMON COLD
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### Grounds for Opposition

False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)

### Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	3384232	Application Date	03/01/2007
Registration Date	02/19/2008	Foreign Priority Date	NONE
Word Mark	ALLERX		

Design Mark	
Description of Mark	The mark consists of the stylized word ALLERX.
Goods/Services	Class 005. First use: First Use: 1999/04/25 First Use In Commerce: 1999/04/25 Anti-allergy preparations; antihistamine preparations; and decongestant preparations

Attachments	77120121#TMSN.jpeg ( 1 page )( bytes ) notoppvisrx_20080222175450.pdf ( 7 pages )(299857 bytes )
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### **Certificate of Service**

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/jmorris/
Name	Robert J. Morris
Date	02/22/2008

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Application Serial No. 77/226,994

Filed: July 11, 2007

Mark: VISRX

Published in the Official Gazette: December 25, 2007

CORNERSTONE BIOPHARMA, INC., )

Opposer, )

v. )

VISION PHARMA, LLC, )

Applicant. )

Opposition No. \_\_\_\_\_

**NOTICE OF OPPOSITION**

Cornerstone BioPharma, Inc. hereby states that it believes that it will be damaged by registration of the mark shown in Serial No. 77/226,994 in International Class 005 and therefore opposes same.

As grounds for opposition, it is alleged as follows:

1. Opposer, Cornerstone BioPharma, Inc., is a corporation organized and existing under the laws of the State of Nevada which maintains its principal place of business in Cary, North Carolina.
2. Opposer markets patented prescription medicines for the treatment of respiratory illness.
3. Since 1999, Opposer and its predecessor in interest have used the trademark ALLERX in connection with the marketing and sale of pharmaceutical preparations in the United States for the temporary relief of symptoms associated with allergic rhinitis.

4. Opposer's ALLERX Dose Pack is a prescription-only 10-day or 30-day prepackaged therapeutic regimen for temporary relief of symptoms associated with allergic rhinitis. Since its introduction in 2001, ALLERX Dose Pack has enjoyed significant sales growth, with sales increasing from \$4.4 million in 2001 to \$13.4 million in 2007.

5. Opposer also uses the trademark ALLERX in connection with the marketing and sale of other pharmaceutical preparations for the temporary relief of allergic rhinitis, including ALLERX-D and ALLERX Suspension.

6. By virtue of the popularity and quality of Opposer's ALLERX pharmaceutical preparations for the temporary relief of symptoms associated with allergic rhinitis, Opposer's extensive marketing and promotional efforts, and its substantial and exclusive use of the ALLERX mark in connection with such pharmaceutical preparations, Opposer's ALLERX trademark has acquired great value as a way of identifying the pharmaceutical preparations sold by Opposer for the temporary relief of symptoms associated with allergic rhinitis and as a way of distinguishing such pharmaceutical preparations from those sold by others.

7. Opposer and its ALLERX trademark have become well known among health care providers, pharmacists, consumers and the public generally, as persons know Opposer by its distinctive ALLERX trademark, and they associate Opposer's ALLERX trademark with the pharmaceutical preparations that Opposer offers for the temporary relief of symptoms associated with allergic rhinitis. As a result of Opposer's extensive use of the ALLERX trademark in interstate commerce, health care providers, pharmacists, consumers and the general public have come to recognize the mark as signifying and identifying Opposer as the source of the products it sells and distributes. The ALLERX trademark, therefore, is symbolic of extensive goodwill and consumer recognition built up by Opposer through its advertising and promotional efforts.

8. Opposer is the owner of U.S. Registration No. 3,384,232, which issued on February 19, 2008, for the trademark ALLERX for use in connection with anti-allergy preparations, antihistamine preparations, and decongestant preparations in International Class 005. Opposer also is the owner of common law rights in the mark ALLERX.

9. Applicant filed U.S. Application Serial No. 77/226,994 on July 11, 2007 to register "VISRX" as a trademark for a pharmaceutical preparation for the relief of symptoms associated with allergic rhinitis, vasomotor rhinitis and the common cold in International Class 005.

10. Applicant filed U.S. Application Serial Number 77/226,994 on an intent-to-use basis. Applicant has not yet claimed use of the "VISRX" mark in the United States.

11. It has come to Opposer's attention that Applicant has begun using the "VISRX" mark in connection with the marketing and sale of an unauthorized generic version of ALLERX Dose Pack that Applicant calls "VISRX Dose Pack." Like ALLERX Dose Pack, "VISRX Dose Pack" is a prepackaged 10-day or 30-day prepackaged therapeutic regimen for temporary relief of symptoms associated with allergic rhinitis. At the time it was launched, "VISRX Dose Pack" used the same active ingredients and dosages as ALLERX Dose Pack.

12. The product informational insert distributed by Applicant with its "VISRX Dose Pack" product is virtually a word-for-word copy of the Opposer's product informational insert for ALLERX Dose Pack.

13. Applicant has listed "VISRX Dose Pack" as a generic equivalent or other substitute for ALLERX Dose Pack in one or more of the national pharmaceutical databases that are widely used by pharmacists and health care providers in selecting and dispensing prescription drugs. Applicant listed "VISRX Dose Pack" as a generic equivalent or other substitute for

ALLERX Dose Pack in order to encourage substitution of "VISRX Dose Pack" for ALLERX Dose Pack based on the lower selling price of "VISRX Dose Pack."

14. Applicant offers its "VISRX Dose Pack" product for sale in the same or similar channels of commerce as Opposer offers its ALLERX Dose Pack products for sale.

15. Applicant offers its "VISRX Dose Pack" product for sale to the same or similar customers as Opposer offers its ALLERX Dose Pack products for sale.

16. Applicant's application for "VISRX" was published for opposition on December 25, 2007. Opposer sought an Extension of Time to File a Notice of Opposition on January 23, 2008. The Trademark Trial and Appeal Board granted such extension request and has set February 23, 2008 as the time for filing the Notice of Opposition.

17. There is no issue as to priority. The use of the ALLERX trademark by Opposer and its predecessor in interest predates Applicant's filing of U.S. Application Serial Number 77/226,994 and any use of the "VISRX" mark by Applicant by seven years or more.

18. Applicant's mark "VISRX" is confusingly similar to Opposer's registered ALLERX trademark when used in connection with pharmaceutical preparations for the treatment of symptoms associated with allergic rhinitis, vasomotor rhinitis and the common cold, as applied for.

19. In view of the prior and substantial use of the trademark ALLERX by Opposer and its predecessor in interest in connection with anti-allergy preparations, antihistamine preparations, and decongestant preparations (including preparations for the temporary relief of symptoms associated with allergic rhinitis), as well as Opposer's extensive promotional and marketing efforts targeted to the same or similar channels of commerce and potential purchasers to which Applicant intends to target sales of its preparation for the temporary relief of symptoms

associated with allergic rhinitis, Applicant's use of the mark "VISRX" as set forth in U.S. Application Serial No. 77/226,994 falsely suggests a connection with Opposer within the meaning of 15 U.S.C. § 1052(a) and/or so resembles Opposer's registered ALLERX trademark as to be likely to cause confusion, mistake and/or deception within the meaning of 15 U.S.C. § 1052(d) as to the affiliation, connection, or association of Applicant with Opposer, or as to the origin, sponsorship, or approval of Applicant's goods, services or commercial activities with Opposer. Any such confusion in the trade inevitably will result in loss of sales to the Opposer, causing damage to Opposer within the meaning of 15 U.S.C. § 1063(a). Moreover, any defect, objection or fault found with Applicant's pharmaceutical preparation for the relief of symptoms associated with allergic rhinitis, vasomotor rhinitis or the common cold that are marketed under the mark "VISRX," as applied for, would reflect upon and injure the reputation which Opposer has established for the pharmaceutical preparations it markets and sells under its ALLERX trademark for the temporary relief of symptoms associated with allergic rhinitis, also causing damage to Opposer within the meaning of 15 U.S.C. § 1063(a).

20. Opposer also will be damaged by the registration of Applicant's "VISRX" mark within the meaning of 15 U.S.C. § 1063(a) because such registration will support and assist Applicant in its confusing and misleading use of Applicant's "VISRX" mark and in infringing Opposer's registered ALLERX trademark, and because such registration will give Applicant color of right in and to Applicant's "VISRX" mark, in violation and derogation of the prior and superior rights of Opposer.

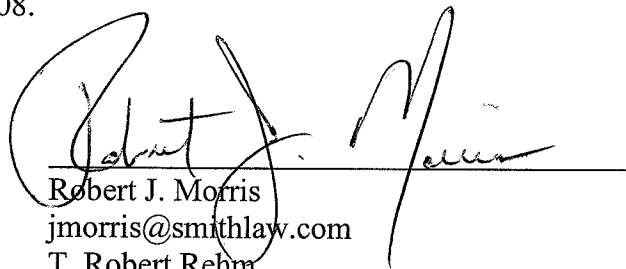
21. Further, use of Applicant's "VISRX" mark, as applied for, is false and misleading and likely to cause confusion with Opposer's registered ALLERX trademark and is therefore in

violation of 15 U.S.C. § 1125(a), causing damage to Opposer within the meaning of 15 U.S.C. § 1063(a).

22. Opposer believes, and therefore states, that it will be damaged by registration of the mark "VISRX" that is the subject of U.S. Application Serial No. 77/226,994 and requests that registration be refused.

WHEREFORE, Opposer requests that this opposition be sustained, that U.S. Application Serial No. 77/226,994 be rejected, and that registration of the mark set forth therein for the goods specified in International Class 005 be refused.

This the 22<sup>nd</sup> day of February, 2008.



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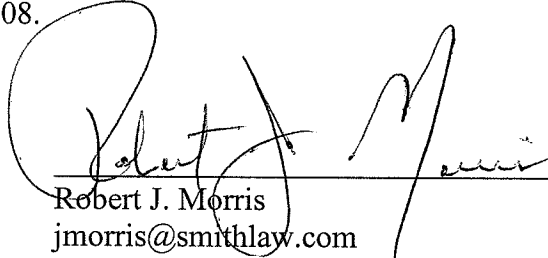


# **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Opposition was served on counsel of record for Applicant, Vision Pharma, LLC, by depositing a copy hereof in the United States mail, first-class postage prepaid, addressed as follows:

S. Benjamin Pleune  
Alston & Bird, LLP  
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Charlotte, North Carolina 28280-4000

This the 22<sup>nd</sup> day of February, 2008.



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